THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
CIRCUIT COURT

The Hon. R. Lawton McIntosh, Circuit Court Judge

Opinion No. 2021-UP-418 (S.C. Ct. App., filed November 24, 2021)

Jami Powell and Encore Technology Group, LLC,
Of which Encore Technology Group, LLC is the ..... Appellant,

v.

Clear Touch Interactive, Inc. (a Nevada Corporation),
f/k/a Clear Touch Interactive LLC (a Nevada LLC);
Keone Trask and Tamara Trask, ... Respondents.

ENCORE TECHNOLOGY GROUP, LLC'S PETITION FOR A WRIT OF CERTIORARI

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INDEX

CERTIFICATION

The undersigned counsel for Petitioner certifies that a Petition for Rehearing was made and finally ruled on by the Court of Appeals on January 11, 2022.

QUESTION PRESENTED FOR REVIEW

I. **Where the Court of Appeals erroneously required Encore to elect between verdicts against Trask for breach of contract accompanied by a fraudulent act and violation of the Trade Secrets Act, did the Court err in failing to require Trask to pay exemplary damages for his willful violation of the Trade Secrets Act in addition to Clear Touch's payment of exemplary damages?**

STATEMENT OF THE CASE

Encore Technology Group, LLC ("Encore") paid Keone Trask ("Trask") nearly $200,000 per year to serve as its Director of Product Development and locate suppliers for Encore's products, including interactive panels that Encore sold to K-12 schools. (Trial Transcript ("Transcript"), R. p. 277, l.8-R. p. 278, l.9; R. p. 304, l.21-R. p. 305, l.18; R. p. 367, ll. 19-24; R. p. 368, ll. 4-7; Plaintiff's Exhibit 1, R. pp. 382-386)

Instead of working solely for Encore, however, Trask formed a side company, Clear Touch Interactive, Inc., f/k/a Clear Touch Interactive, LLC ("Clear Touch"), to sell panels to and divert profits from Encore while he was on Encore's payroll. (Plaintiff's Exhibit 3, R. pp. 387-403; Transcript, R. p. 365, l.16-R. p. 366, l.10) Evidence at trial demonstrated that Trask:

- Did not disclose to Encore his involvement in Clear Touch while he was an employee of Encore (Transcript, R. p. 325, l.9-R. p. 326, l.13; R. p. 327, ll.20-24; R. p. 345, l.19-R. p. 347, l.22; Plaintiff's Exhibit 8, R. pp. 406-408; Plaintiff's Exhibit 83, R. pp. 459-463; Final Order and Judgment, R. p. 33);
- Listed his mother—who used her maiden name—as owner of Clear Touch to hide his affiliation with Clear Touch (Transcript, R. p. 279, l1.14-22; R. p. 283, ll.15-21; R. p. 302, l.1-R. p. 303, l.17; Final Order and Judgment, R. p. 33);
- Had the true suppliers of the interactive panels Encore was buying remove their labels from panels and replace them with Clear Touch labels to hide the suppliers' identities from Encore (Transcript, R. p. 279, ll.23-25; R. p. 283, ll.7-14; R. p. 284, ll.1-8; R. p. 328, l.18-

R. p. 329, l.25; R. p. 330, l.9-R. p. 332, l.9; Plaintiff's Exhibit 5, R. p. 405; Plaintiff's Exhibit 39, R. p. 435; Plaintiff's Exhibit 40, R. pp. 436-438; Plaintiff's Exhibit 43, R. pp. 439-442; Final Order and Judgment, R. p. 33);

- Marked up the suppliers' prices that Clear Touch charged to Encore (Transcript, R. p. 284, ll.9-18; R. p. 332, l.10-R. p. 334, l.10; Plaintiff's Exhibit 44, R. p. 443; Final Order and Judgment, R. p. 33);

- Had Encore send its checks to Clear Touch to a Nevada post office box and forwarded them back to South Carolina (Transcript, R. p. 280, ll. 14-19; R. p. 283, ll.22-25; R. p. 313, l. 9-R. p. 316, l.2; Final Order and Judgment, R. p. 34);

- Had his wife, Tamara Trask, work for Clear Touch but pose to Encore under the false name "Amy Andrews" to hide the Trasks' affiliation with Clear Touch (Transcript, R. p. 280, l.1; R. p. 308, l.1-R. p. 313, l.8; R. p. 321, l.19-R. p. 324, l.17; R. p. 360, ll.14-19; Plaintiff's Exhibit 4, R. p. 404; Plaintiff's Exhibit 26, R. p. 420; Plaintiff's Exhibit 27, R. pp. 421-22; Plaintiff's Exhibit 29, R. pp. 423-27; Plaintiff's Exhibit 33, R. p. 433; Plaintiff's Exhibit 34, R. p. 434; Final Order and Judgment, R. p. 34);

- While at conferences for Encore, worked to sign resellers for Clear Touch by initially leading them to believe Encore was an owner of Clear Touch (Transcript, R. p. 291, l.4-R. p. 301, l.24; R. p. 334, l.11-R. p. 335, l.3; Plaintiff's Exhibit 48, R. p. 444; Plaintiff's Exhibit 78, R. p. 450; Plaintiff's Exhibit 79, R. p. 451; Plaintiff's Exhibit 80, R. pp. 452-458; Final Order and Judgment, R. p. 34);

- Got Encore's employees, Leo Gallant and Jimmy Higginbotham, to sign non-disclosure agreements—including one on the day Trask left Encore—so that he could disclose his ownership of Clear Touch but prevent them from disclosing same to Encore and thereby induce them to work for Clear Touch and its benefit while on Encore's payroll (Transcript, R. p. 280, l.20-R. p. 282, l.15; R. p. 317, l.14-R. p. 321, l.18; Plaintiff's Exhibit 15, R. pp. 413-417; Plaintiff's Exhibit 32, R. pp. 428-432; Final Order and Judgment, R. p. 34); and

- Permanently deleted incriminating e-mails (Transcript, R. p. 342, l.21-R. p. 344, l.19; R. p. 351, l.20-R. p. 353, l.9; R. p. 354, ll.2-8; R. p. 369, l. 17-R. p. 372, l.21; Plaintiff's Exhibit 73, R. pp. 447-449; Plaintiff's Exhibit 79, R. p. 451; Final Order and Judgment, R. p. 34).

In addition to these actions, Trask and Clear Touch (collectively, "Respondents") misappropriated Encore's trade secrets and utilized them to take away business from Encore. Specifically, as an employee of Encore, Trask learned that Leon County Schools in Florida had preferences to purchase specific interactive panels at specific prices, and along with Clear Touch utilized these trade secrets to take away the sales from Encore and make them directly from Clear

Touch, costing Encore $424,945 in lost profits. (Plaintiff's Exhibit 10.H, R. p. 410; Plaintiff's Exhibit 53, R. p. 445; Plaintiff's Exhibit 58, R. p. 446; Transcript, R. p. 306, l.9-R. p. 307, l.25; R. p. 336, l.1-R. p. 341, l.3.)

After uncovering Trask's actions, Encore filed its Complaint in Case No. 2015-CP-23-05757 on September 18, 2015, asserting, among others, a cause of action against Trask and Clear Touch for misappropriation of trade secrets. (Complaint, R. pp. 89-90) At the conclusion of trial that occurred September 25-29, 2017, the jury entered verdicts of $7,052,023 in damages against Trask, including $3,377,023 in actual damages and $3,675,000 in punitive damages. (Verdict Form, R. pp. 464-471) Specifically, these verdicts found that (1) Trask had breached his duty of loyalty to Encore ($375,733 actual and $175,000 punitive damages), (2) breached his fiduciary duties to Encore ($675,361 actual and $1,500,000 punitive damages), (3) diverted profits from Leon County Schools in breach of his contract with Encore ($424,945 actual damages), (4) misappropriated trade secrets regarding Leon County Schools from Encore in violation of the South Carolina Trade Secrets Act ($424,945 actual damages and willful violation of the Trade Secrets Act), and (5) breached his contract accompanied by fraudulent acts ($1,476,039 actual and $2,000,000 punitive damages). (Verdict Form, R. pp. 464-471)

Against Clear Touch the jury rendered two verdicts: (1) one for tortious interference with Encore's contractual relations in the amount of $424,945 in actual damages and $500,000 in punitive damages, and (2) the other for violation of the South Carolina Trade Secrets Act in the amount of $424,945 in actual damages and willful violation of the Trade Secrets Act). (Verdict Form, R. pp. 464-471)

On October 9, 2017, Encore filed and served its Motion for Judgment, in which it asked the Circuit Court to enter judgments in the foregoing amounts plus $849,890 in exemplary

damages, two times the actual damages, against each of Trask and Clear Touch, based upon the jury's findings of both parties' willful violation of the Trade Secrets Act. (Verdict Form, R. p. 467; Plaintiff's Motion for Judgment, R. p. 201)

On April 2, 2018, the Circuit Court entered a Final Order and Judgment in favor of Encore against Trask in the amount of $7,917,468.40 and against Clear Touch in the amount of $1,715,335. (Final Order and Judgment, R. pp. 10-11) The Court awarded $849,890 in exemplary damages against each of Trask and Clear Touch, based upon the jury's findings of both defendants' willful violations of the Trade Secrets Act. (Final Order and Judgment, R. p. 4) Pursuant to the Final Order and Judgment, Clear Touch's payment of the full amount of the judgment against it would reduce Trask's judgment liability by $865,445, to $7,052,023.40. (Final Order and Judgment, R. p. 11, n.3 ("Because the jury determined that both Defendants were liable for misappropriation of Trade Secrets, Defendants are jointly and severally liable to Encore for the actual damages of $424,945, the attorneys' fees of $345,600, and the costs and expenses of $94,900, or a total of $865,445 on this claim. Therefore, payment by one Defendant of this amount on this claim will reduce the other Defendant's liability for this claim. Each Defendant, however, will owe exemplary damages of $849,890 for this claim because each engaged in willful, wanton, and reckless disregard of the Plaintiff's rights."))

In April 2018, Clear Touch made deposits with the Greenville County Clerk of Court totaling $1,715,335, including actual damages of $424,945, attorneys' fees of $345,600, costs and expenses of $94,900, and exemplary damages against it of $849,890 for violation of the Trade Secrets Act, entitling Trask to a credit of $865,445 and leaving Trask responsible for $7,052,023 plus post-judgment interest at 8.5% per annum from April 2, 2018. (Clerk's Email dated January 3, 2019, Defendants' Hearing Exhibit 4, R. p. 473)

On July 23, 2018, the Circuit Court entered an Order Appointing Receiver (the "Receivership Order") to monitor and preserve the non-exempt assets of Trask. On that same day, Defendants appealed the Final Order and Judgment and the Receivership Order.

On January 3, 2019, Trask made a deposit with the Greenville County Clerk of Court totaling $6,600,769.58. (Clerk's Email dated January 3, 2019; Defendants' Hearing Exhibit 4, R. p. 473) That left Trask responsible for $904,515.38 on the Final Order and Judgment (exemplary damages under the Trade Secrets Act of $849,890 plus post-judgment interest on that amount from April 2, 2018), plus the Receiver's fees and costs, and Encore's fees and costs of collecting the judgment, for a total of $1,233,143.53.

Trask then moved to dissolve the Receivership Order, which motion the Circuit Court considered at a February 7, 2019 hearing. In response to Trask's motion, the Circuit Court modified its Final Order and Judgment to rule that, because Clear Touch had paid exemplary damages, Trask was not obligated to pay the exemplary damages assessed against him for his willful violation of the Trade Secrets Act. (Order Staying Receivership, R. pp. 57-58) Trask deposited the Receiver's fees and costs,[1] and the Receivership was stayed.

Separately, Jami Powell, a purported owner of Clear Touch, brought a case styled *Jami Powell and Encore v. Clear Touch, Trask, and Tamara Trask,* Case No. 2017-CP-23-06520, against Trask, Tamara Trask, and Clear Touch seeking to undo a conversion of Clear Touch from an LLC owned by Trask individually with others to a corporation owned by Trask's ostensible "retirement plan" (the "Powell Case"). (Powell Complaint, R. pp. 151-162) The Circuit Court allowed Encore to intervene as a plaintiff in the Powell Case because of Encore's interest in the

[1] The Circuit Court ordered Trask to deposit the Receiver's fees and costs. (Order Staying Receivership, R. p. 62)

outcome. Specifically, if the conversion of Clear Touch to a corporation were ruled to be invalid, Trask would own a membership interest that could be attached to satisfy Encore's judgment. As explained by the Circuit Court:

> [D]isposition of this action may impair or impede [Encore's] ability to protect [its] interest. Although Encore may be able to assert the same claims in a separate action, such proceedings would be inefficient and risk inconsistent rulings. As in *Berkeley Electric*, if the Court rules in this action that Keone's conversion was valid, it could be extremely difficult for Encore to collaterally attack that ruling. Allowing Encore to intervene in this action is the best way to ensure that disposition of this action does not impair or impede Encore's ability to protect its interest in collecting its Judgment and that Encore's claims and the common claims in this action are resolved efficiently and consistently.

(Order Granting Motion to Intervene by Encore Technology Group, LLC, R. pp. 66-67)

In light of Clear Touch's and Trask's deposits with the Clerk of Court, the defendants in the Powell Case moved to dismiss Encore as a party. (Motion to Dismiss, Powell Case, R. pp. 214-216) The Circuit Court held that "Encore should be dismissed as a party to this action because it no longer has any interest in the outcome of the claims in this case and as a result lacks the necessary standing to pursue its claims." (Order on Motion to Dismiss, Powell Case, R. p. 69) Specifically, the Court dismissed Encore from the Powell Case on the basis that "because [Encore] can recover the $849,890 in exemplary damages under the Trade Secrets Act from only one Defendant, the Defendants [Trask and Clear Touch] have paid the entire balance of the judgments against them into the Court, fully securing their outstanding debt to Encore resulting from the verdict, and therefore Encore has no standing to remain a party to this action." (Order on Motion to Dismiss, Powell Case, R. p. 73)

Encore appealed both the Order Staying Receivership and the Order on Motion to Dismiss in the Powell Case on March 25, 2019, and the Court of Appeals consolidated Encore's appeals.

On November 24, 2021, the Court of Appeals issued Opinion No. No. 2021-UP-418 in this matter (the "Opinion"). The Opinion affirmed the trial court's decision not to require Trask to pay exemplary damages. The Opinion was based, not on the merits of Encore's arguments in its briefs, but on the Court's Opinion No. 5871 in Appellate Case No. 2018-001444, filed November 24, 2021 (the "Election Decision"), upon which the Court "presume[d] Encore will not elect to recover on the trade secrets claim" against Trask.

ARGUMENT

I. Where the Court of Appeals erroneously required Encore to elect between verdicts against Trask for breach of contract accompanied by a fraudulent act and violation of the Trade Secrets Act, the Court erred in failing to require Trask to pay exemplary damages for his willful violation of the Trade Secrets Act in addition to Clear Touch's payment of exemplary damages.

For the reasons stated in Encore's Petition for a Writ of Certiorari to review the Court of Appeals' Election Decision, which is incorporated herein by reference, errors by the Court of Appeals warrant reversal of the Election Decision, which would allow Encore to recover both verdicts against Trask for breach of contract accompanied by a fraudulent act and for violation of the South Carolina Trade Secrets Act ("SCTSA").

With that correction, Trask should be required to pay exemplary damages on the trade secrets claim under the plain language of S.C. Code Ann. § 39-8-40(C) and *McGee v. Bruce Hosp. Sys.*, 344 S.C. 466, 471-72 n.3, 545 S.E.2d 286, 288-89 n.3 (2001) ("Punitive damages awarded against one tortfeasor do not constitute double recovery with respect to a judgment against another tortfeasor since the purpose of punitive awards is to punish a particular offender rather than to compensate the victim for its injury.").

Respondents do not dispute that the Final Order and Judgment initially awarded $849,890 in exemplary damages under the SCTSA against each of Trask and Clear Touch. (Final Order and Judgment, R. p. 11, n.3) Respondents also do not dispute that they appealed the Final Order and

Judgment to this Court on July 23, 2018, and therefore the Court of Appeals had "exclusive jurisdiction over the appeal." Rule 205, SCACR; *Bunkum v. Manor Props.*, 321 S.C. 95, 98-99, 467 S.E.2d 758, 760 (Ct. App. 1996). Additionally, Respondents do not dispute that, after they appealed, the lower court changed its ruling in the Final Order and Judgment that Trask and Clear Touch were each liable for exemplary damages of $849,890, ruling instead that Clear Touch's payment of exemplary damages satisfied Trask's obligation to pay them.

Because the Final Order and Judgment was on appeal, the Circuit Court had no jurisdiction to make subsequent findings inconsistent with those in the Final Order and Judgment or to deprive Encore of its rights thereunder. Yet this is exactly what the Circuit Court did by reversing its own holding, in footnote 3 of the Final Order and Judgment, that Respondents were each separately liable for the exemplary damages. Respondents never objected to or took issue with this part of the Final Order and Judgment before they appealed, and they should not have been allowed a second bite at the apple after they appealed.

Moreover, the Circuit Court erred in modifying the Final Order and Judgment so that two defendants had to pay only one award of exemplary damages, even though the jury found that both had violated the South Carolina Trade Secrets Act with a willful, wanton, or reckless disregard of Encore's rights.

Although they caused the same actual damages, because they were two separate defendants, the jury's verdict resulted in two awards under the SCTSA: one against Trask and one against Clear Touch. Respondents' argument that exemplary damages are limited to double only one of these awards depends upon changing the words of the statute from "**any award**" to "**actual damages**."

The SCTSA, however, unambiguously allows the Circuit Court to award exemplary damages in the amount of twice any award and, because there were two separate awards—one against Trask and one against Clear Touch—the Court's initial award of exemplary damages against each of Trask and Clear Touch was proper.

Specifically, S.C. Code Ann. § 39-8-40(C) provides that, "[u]pon a finding of willful, wanton, or reckless disregard of the plaintiff's rights, the court may award separate exemplary damages in an amount not exceeding twice any award made under subsection (A)." *Id.* (emphasis added). Therefore, in cases where multiple defendants misappropriate the same trade secrets and cause the same actual damages, the statute as written authorizes "separate" exemplary damages against each defendant, because awards of actual damages against multiple defendants are necessarily multiple awards. In other words, where two or more defendants are jointly and severally liable for actual damages, the award against each defendant is necessarily a separate and independent award that can sustain separate awards of exemplary damages.

To operate as Respondents contend, Section 39-8-40(C) would need to be re-written to make the cap on exemplary damages an amount not exceeding twice "actual damages." Of course, courts cannot re-write statutes.

Because the jury found that both Trask and Clear Touch had misappropriated Encore's trade secrets and caused Encore actual damages and that both defendants acted with willful, wanton, or reckless disregard of Encore's rights, the jury verdict resulted in two awards, one against Clear Touch and one against Trask. (Verdict Form, R. p. 467) Accordingly, the Circuit Court properly assessed separate exemplary damages against each of Trask and Clear Touch initially, and should not have reversed this ruling after the appeal was filed.

Further, the Circuit Court's modified interpretation of the SCTSA must be rejected as contrary to the common law, which provides for separate punitive damages against joint tortfeasors. As demonstrated above, the SCTSA's limit on exemplary damages is twice "any award," not twice "actual damages," and therefore the initial award of exemplary damages against each of Trask and Clear Touch should have been maintained under the clear language of the statute. If, however, a court finds the language ambiguous, it should adopt the construction consistent with common law, not in derogation of it. *Hoogenboom v. City of Beaufort*, 315 S.C. 306, 318 n.5, 433 S.E.2d 875, 884 n.5 (Ct. App. 1992), adhered to on reh'g (Apr. 29, 1993); *Doe v. Marion*, 361 S.C. 463, 473, 605 S.E.2d 556, 561 (Ct. App. 2004), aff'd, 373 S.C. 390, 645 S.E.2d 245 (2007) (internal citations omitted).

The common law that is where defendants are jointly and severally liable for actual damages, they are each still separately liable for punitive damages. *McGee v. Bruce Hosp. Sys.*, 344 S.C. 466, 471-72 n.3, 545 S.E.2d 286, 288-89 n.3 (2001) ("Punitive damages awarded against one tortfeasor do not constitute double recovery with respect to a judgment against another tortfeasor since the purpose of punitive awards is to punish a particular offender rather than to compensate the victim for its injury."); see *also Beerman v. Toro Mfg. Corp.*, 615 P.2d 749, 755 (Hawaii Ct. App. 1980); *Medearis v. Miller*, 306 N.W.2d 200, 204 (N.D. 1981); *Burgess v. Porterfield*, 469 S.E.2d 114, 119 (W. Va. 1996).

The Circuit Court relied on *Smith v. Strickland*, 314 S.C. 192, 442 S.E.2d 207 (Ct. App. 1994), to rule otherwise. That case, however, is inapplicable because it involved only election among multiple remedies for one injury. Specifically, *Smith v. Strickland* held only that plaintiffs prevailing on four causes of action for the same injury, the same actual damages, and punitive damages under three of the causes of action, had to elect an award of actual damages under one

cause of action, and could not add the punitive damages awards from three causes of action for each defendant. The Court did not address the issue in *McGee* and here—whether each defendant could be required to pay punitive damages separately when they were jointly and severally liable for the same actual damages. Following *McGee*, the common law is clear that each defendant is responsible to pay punitive damages separately, even though jointly and severally liable for actual damages.

In sum, because it misinterpreted *Smith* and failed to follow the plain language of the SCTSA and *McGee*, the Circuit Court failed to interpret the SCTSA consistent with common law, which was error.

Contrary to the Opinion, once the trial court's decision on Election of Remedies is affirmed and Trask is required to pay exemplary damages on the trade secrets claim, Clear Touch and Trask will not have paid amounts sufficient to satisfy the judgments against them. Therefore, the Court should require Trask to pay exemplary damages to Encore on the trade secrets claim, plus post-judgment interest on same.

Finally, even though Clear Touch did not appeal the election of remedies rulings on the judgment against it, Respondents have argued the Election Decision means that Encore's election of the verdicts of breach of duty of loyalty and breach of contract accompanied by a fraudulent act against Trask precludes Encore from recovering anything – including the $850,000 in exemplary damages – on the Trade Secrets Act verdict from Clear Touch. Therefore, in addressing the trade secrets issue, the Court should make clear that the Election Decision does not eliminate Clear Touch's liability for the judgment against it under the Trade Secrets Act (including exemplary damages), in order to avoid another multi-year round of appeals.

CONCLUSION

For the foregoing reasons, the Court should issue a new opinion requiring Trask to pay exemplary damages to Encore on the trade secrets claim, plus post-judgment interest on same.

Respectfully submitted,

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f/k/a Clear Touch Interactive LLC (a Nevada LLC);
Keone Trask and Tamara Trask, ... Respondents.

PROOF OF SERVICE

I, Gregory J. English, of Wyche, P.A., attorneys for the Appellant in this appeal, do hereby certify that I have this date served upon opposing counsel for the party who has served a brief in this appeal the **ENCORE TECHNOLOGY GROUP, LLC'S PETITION FOR WRIT OF CERTIORARI** by Email and first class U.S. mail, addressed to the following:

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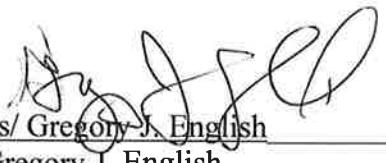

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February 10, 2022

Greg English

From: Greg English
Sent: Thursday, February 10, 2022 4:10 PM
To: Josh Smith; Josh Hudson
Cc: Rita Bolt Barker; Greg English
Subject: Jami Powell & Encore Technology Group, LLC vs. Clear Touch Interactive, Inc., et al. - Encore's Petition for Cert.
Attachments: Encore Petition for Cert..pdf

Josh and Josh,

We hereby serve upon you Encore's Petition for Certiorari in this case.

Sincerely, Greg

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